Supreme Court, U.S.
FILED
AUG 10 1993
OFFICE OF THE CLERK

(3)

NO. 93-69

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF ALABAMA,
Petitioner,
v.
RICKEY LEE JOHNSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Kevin Martin Doyle*
Bryan A. Stevenson
158 Lucerne Boulevard
Birmingham, Alabama 35209
(205) 879-1035

Attorneys for Mr. Johnson

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION..... 1

REASONS WHY THE PETITION SHOULD BE DENIED..... 4

I. BY FAILING TO FILE ITS PETITION IN A TIMELY FASHION, THE STATE OF ALABAMA HAS FORGONE REVIEW BY THIS COURT, PURSUANT TO 28 U.S.C.§ 2101(d) AND SUPREME COURT RULE 13. 4

II. NEITHER THE DECISION NOR THE RECORD BELOW RAISES THE QUESTIONS PRESENTED IN THE PETITION. 5

A. The Thirty-Page Statement, Played Unedited For The Jury, Went Beyond Any Semblance Of Mere Impeachment. 6

B. The Jury Considered Johnson's Thirty-Page Statement For All, Not Just Impeachment, Purposes. 9

C. Not Once Did The Prosecution Lay The Necessary Foundation For Impeachment With Extrinsic Evidence Of Prior Inconsistent Statements. 10

III. THE PETITIONER'S THREE QUESTIONS PRESENTED DO NOT, ON FACE, MERIT CERTIORARI REVIEW. 14

IV. THE SUMMARY REVERSAL THE STATE OF ALABAMA DESIRES WOULD BE WHOLLY UNJUSTIFIED. 15

CONCLUSION..... 18

TABLE OF AUTHORITIES

FEDERAL CASES

Boag v. MacDougall, 454 U.S. 364 (1982) 14

Bradford v. Whitley, 953 F.2d 1008 (5th Cir. 1992) 8

Brown Transportation Corp. v. Atcon, 439 U.S. 1014 (1978) 15

Harris v. New York, 401 U.S. 222 (1971) . . . . . Passim

Jackson v. Denno, 378 U.S. 368 (1964) 16

Lego v. Twomey, 404 U.S. 477 (1972) 17

Michigan v. Harvey, 494 U.S. 344 (1990) 16

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . . Passim

Ohio v. Huertas, 498 U.S.____, 111 S. Ct. ____, 112 L. Ed. 2d 837 (1991) 17

Oregon v. Hass, 420 U.S. 714 (1975) . . . . . Passim

Pinto v. Pierce, 389 U.S. 31 (1967) 16

Schact v. United States, 398 U.S. 58 (1970) . . . 4

Schweiker v. Hansen, 450 U.S. 785 (1981) 15

United States v. Cervantes, 542 F.2d 773 (9th Cir. 1976) 10

United States v. Havens, 446 U.S. 620 (1980) . . . 10

United States v. Rada-Solano, 625 F.2d 577 (5th Cir.), cert. denied, 449 U.S. 1021 (1980) . . 10

United States v. Rowley, 975 F.2d 1357 (8th Cir. 1992) 8

STATE CASES

State v. Cartwright, 650 P.2d 758 (Mont. 1982) . . 8

Felder v. State, 470 So. 2d 1321 (Al.Cr.App. 1984), aff'd, 470 So. 2d 1330 (Ala. 1985), vacated on other grounds, 474 U.S. 976 (1985) 16

Jones v. State, 584 So. 2d 917 (Al.Cr.App.), cert. denied, 584 So. 2d 917 (Ala. 1991) 16

People v. Maerling, 474 N.E.2d 231 (N.Y. 1984) . . 10

Perkins v. State, 574 So. 2d 988 (Ala.Cr.App.1990), cert. denied, 574 So. 2d 988 (1991) 8

Ex parte Watts, 471 So. 2d 505 (Ala. 1985) 13

Wilson v. State, 551 So. 2d 447 (Ala.Cr.App.), cert. denied, 551 So. 2d 447, McElroy's Alabama Evidence (4th ed. 1991 11

Wypsinger v. State, 448 So. 2d 435 (Al.Cr.App 1983), cert. denied, 448 So. 2d 435 (Ala. 1984) 11

STATUTES AND RULES

28 U.S.C. § 2101(d) 4

Sup. Ct. R. 10 14

Sup. Ct. R. 13 4

Sup. Ct. R. 16 15

Sup. Ct. R. 29 4

No. 93-69

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF ALABAMA,	)
Petitioner,	)
v.	)
RICKEY LEE JOHNSON,	)
Respondent.	)

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

COMES NOW RICKEY LEE JOHNSON, who respectfully files the following opposition to the State of Alabama's *Petition for a Writ of Certiorari to the Supreme Court of Alabama* (hereinafter "*Petition*").

A. INTRODUCTION AND SUMMARY OF ARGUMENT

On August 11, 1989, Rickey Lee Johnson was found guilty of capital robbery-murder in Jefferson County, Alabama. On November 20, 1989, the trial court sentenced Mr. Johnson to die in the electric chair.

Roughly three years later, in January, 1993, the Alabama Supreme Court, reversed and remanded Mr. Johnson's case for a new trial. Without a single dissent, the court held a violation of Miranda v. Arizona had rendered Mr. Johnson's trial fatally infirm. Ex parte Rickey Lee Johnson, No. 1910945, slip op., (Alabama Supreme Court Jan. 15, 1993).

The State of Alabama has now petitioned this Court for a writ of certiorari. (I) The State's petition, however, was filed out of time.

Untimeliness aside, (II) neither the challenged state court decision, Ex parte Rickey Lee Johnson, nor any part of the record below supports even one of the Petitioner's three *questions presented for review* (hereinafter *questions presented*).

More specifically, each *question presented* rests on the notion that the Alabama Supreme Court's application of Miranda v. Arizona was to a post-arrest statement used only to impeach the defendant's testimony. This is simply not so.

True, Mr. Johnson's statement came into evidence only after the defense had rested. Despite the timing of its admission, however, the post-arrest statement, running roughly thirty pages and heard *in toto*, was in no way confined to mere prior inconsistencies. Furthermore, no jury instruction limited the statement's use to determining defendant credibility. Last, the prosecution, during its cross-examination of Mr. Johnson, had

neglected even to lay the full foundation for impeachment with extrinsic evidence.

Even if the Petitioner's *questions presented* had some factual grounding, moreover, (III) there exist no "special or important reasons" for certiorari review. The Petitioner, essentially, seeks to enlist this Court to correct what, granting the Petitioner's interpretation of Ex parte Rickey Lee Johnson, would still be an insignificant aberration in Alabama case law.

Finally, (IV) nothing permits the summary reversal the Petitioner proposes for the legally sound decision rendered by the Alabama Supreme Court. Indeed, even had the Alabama Supreme Court been passing on the admissibility of a statement admitted for mere impeachment, the court's result, *viz.* reversal, would still have been correct. For even a statement allowed only to impeach must be voluntary at its core. Mr. Johnson's request for a hearing on such voluntariness, however, was never honored. The statement admitted, therefore, remained presumptively involuntary. This provides yet another reason why certiorari review should not be granted, but, even more, makes summary reversal unthinkable.

B. REASONS WHY THE PETITION SHOULD BE DENIED

I. BY FAILING TO FILE ITS PETITION IN A TIMELY FASHION, THE STATE OF ALABAMA HAS FORGONE REVIEW BY THIS COURT, PURSUANT TO 28 U.S.C. § 2101(d) AND SUPREME COURT RULE 13.

A petitioner for a writ of certiorari, to be timely, must file his petition within ninety days (90) after the date of judgment or, where applicable, within ninety days (90) after denial of rehearing by the court to whom the writ would be directed. 28 U.S.C. §§ 2101(d)(1988); Sup. Ct. R. 13.

The Alabama Supreme Court overruled the Petitioner's Application For Rehearing on April 9, 1993. The Petition, however, did not arrive in this Court until July 12, 1993, ninety-four (94) days after the Alabama Supreme Court denied rehearing.

Reliance on Supreme Court Rule 29.2's provision for date of mailing as date of service will not assist the Petitioner, furthermore. The Petition was postmarked July 9, 1993. As a date of filing, July 9 would still constitute the ninety-first day after denial of rehearing below.

Last, Respondent is unaware of any enlargement granted, or even sought by, the Petitioner pursuant to Supreme Court Rule 30. Likewise, Respondent is unaware of Petitioner having either proffered any good cause for its lapse or shown why the "ends of justice" demand the lapse be overlooked. Schact v. United States,

398 U.S. 58, 63-64 (1970).

II. NEITHER THE DECISION NOR THE RECORD BELOW RAISES THE QUESTIONS PRESENTED IN THE PETITION.

The Alabama Supreme Court's decision made no mention of extending Miranda v. Arizona, 384 U.S 436 (1966), to statements used simply to impeach. It did not even hint at abandonment of the constitutional doctrine grounded in Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Hass, 420 U.S 714 (1975). In fact, it failed even to cite those cases or their progeny. Ex parte Rickey Lee Johnson, slip op. at 1-11.

That failure did not, as suggested by the Petitioner's *questions presented*, constitute a "direct conflict with the federal constitutional principles announced by this Court", a "conflict with the decisions of the United States Courts of Appeal...and other state courts", or a "demonstrated hostility toward this [United States Supreme] Court's supremacy". *Petition* at i-iii. It reflected instead that, at trial, Mr. Johnson's statement was not used for the limited, impeachment purposes contemplated by Harris and Hass; it reflected that the prosecution was, in essence, allowed to fatten its case-in-chief during its rebuttal case and to do so with a lengthy non-Mirandized statement.

All this the record makes clear in three ways.

A. The Thirty-Page Statement, Played Unedited For The Jury, Went Beyond Any Semblance Of Mere Impeachment.

It is true the prosecution put Mr. Johnson's statement into evidence after Mr. Johnson testified. It is also true the prosecution had cross-examined Mr. Johnson about four brief and minor points where his post-arrest statement purportedly contradicted his trial testimony. This did not, however, justify the wholesale introduction of a lengthy, unedited post-arrest statement under the guise of impeachment.

Those portions of Mr. Johnson's cross-examination during which he was supposedly impeached added up to **no more than three pages** of trial testimony. (R. 1043 (lines 5-20); 1045 (lines 11-23); 1046 (lines 1-4); 1071 (lines 12-21); 1076 (lines 19-23); 1077 (lines 1-6)) Even more to the point, those specific post-arrest comments constituting the purported basis for this impeachment came to **less than a page and a quarter** when played into the trial record. (R. 1100 (lines 7-14); 1099 (lines 20-23); 1089 (lines 6-14); 1096 (lines 16-23)) Additionally, each was contained in the typed police transcript of Mr. Johnson's statement, a transcript which a police official swore to be "true and accurate". (R. 1084)

Still, the state did not, in its so-called rebuttal case, put into evidence the one or two pages worth of relevant, i.e., allegedly inconsistent, police transcript. The state did not even

select out, and then play, only the pertinent portions of the tape recording.

Rather, the prosecution -- with the full leave of the court and despite defense exception (R. 1084) -- played for the jury the whole tape, beginning to end, almost **thirty pages** long (R. 1085-1114), unabridged and unedited. Thus the jury heard not just those few post-arrest remarks that supposedly conflicted with Mr. Johnson's trial testimony; it also heard a devastating collection of comments wholly unrelated to impeachment and flowing directly from Mr. Johnson's own tape-recorded lips into the state's case-in-chief:

By dint of his recorded statement, for example, the jury heard Mr. Johnson say that, prior to arrest, he had confessed to a friend that **"I got myself into a little trouble"**. (R. 1090)

At the same time, the jury heard Mr. Johnson tell how his own cousin had, upon hearing he was under suspicion, asked, **"Rickey, what you done now"**. (R. 1088) The jury also heard Mr. Johnson describe how his cousins had themselves believed **"I burnt that old lady house"**. (R. 1088)

And the jury no doubt paid special attention when Mr. Johnson, who at the beginning of the tape had been identified by three different alias, assented to the assertion of his interrogator (a Sergeant Boissel) that **"the police have been looking for you to talk to you <u>about this</u>, <u>and</u> you are <u>also</u> aware**

of a felony warrant on yourself". (R. 1085; 1108; underscoring added)

The Alabama Supreme Court very correctly recognized the particular harmfulness of these, among other, comments unrelated to any impeachment of defendant's testimony. Ex parte Rickey Lee Johnson, slip op. at 6-7.

The trial court's ruling treated Mr. Johnson's exercise of his right to testify -- with its possibility of impeachment -- as a constructive waiver of his rights under Miranda whereby a statement totally inadmissible, except to impeach, became admissible in total. Warrant for this does not exist in case law. See, e.g., Harris, 401 U.S. 222, 223 (1971) (wherein impeachment allowed but court noted full "statement was not shown to the jury"); Bradford v. Whitley, 953 F.2d 1008 (5th Cir. 1992) (wherein the court identified as pivotal that the state had not put the full statement into evidence: "[T]he key point is that it was [defendant], and not the prosecution, that offered the confession into evidence. Under these circumstances Harris[v. New York], and not Edwards[v.Arizona], is decisive"); United States v. Rowley, 975 F.2d 1357, 1361-62 (8th Cir. 1992) (wherein impeachment allowed but with only one discrete remark in defendant's statement); See also Perkins v. State, 574 So.2d 988, 991 n.2 (Ala.Cr.App.1990), cert. denied, 574 So.2d 988 (1991) (wherein court affirms impeachment use of statement but notes that whole of statement put in evidence only

at request of defendant); State v. Cartwright, 650 P.2d 758, 761-763 (Mont. 1982) (wherein initially "various portions" of defendant's statement were used for impeachment and only "at request of the defense" was the entire statement eventually played for the jury).

B. The Jury Considered Johnson's Thirty-Page Statement For All, Not Just Impeachment, Purposes.

Not once did the jurors receive any kind of limiting instruction concerning Mr. Johnson's post-arrest statement (the last piece of guilt phase evidence they were to hear). They, specifically, heard no interim directive or pre-deliberation charge to consider Mr. Johnson's statement exclusively for the purposes of impeachment.

In fact, the trial court's instructions on witness evaluation omitted any reference to prior inconsistent statements; the trial court, rather, repeatedly and affirmatively mandated the jury to consider "all the evidence". (R. 1199; 1195-96; 1201; 1218-20;1225-26)

This instructional omission by the trial court further undercuts the Petitioner's theory that Mr. Johnson won relief in silent contravention of the Harris-Hass exception to Miranda. See, e.g., Harris, 401 U.S. 222, 223 (noting the trial court's instruction that impeachment evidence not to be considered directly

on guilt issue); Hass, 420 U.S 714, 717 (noting jury charge that: "'you may consider that [impeachment] testimony only as it bears on the (credibility) of the Defendant as a witness'"); United States v. Havens, 446 U.S 620, 623 (1980) (affirming conviction where "jury...instructed that the [illegally obtained] rebuttal evidence should be considered only for impeach[ment]"); United States v. Rada-Solano, 625 F.2d 577, 578-79 (5th Cir.), cert. denied, 449 U.S. 1021 (1980) (wherein the district court, addressing defendant's statement, gave an "appropriate limiting instruction"); United States v. Cervantes, 542 F.2d 773, 777 (9th Cir. 1976) (wherein the district court informed the jury: "Now I admitted [defendant's statement] for the purpose of impeachment."); People v. Maerling, 474 N.E. 2d 231, 232-33 (N.Y. 1984) (wherein the trial court "instructed the jury that [defendant's statement] was to be considered only on the issue of defendant's credibility").

C. Not Once Did The Prosecution Lay The Necessary Foundation For Impeachment With Extrinsic Evidence Of Prior Inconsistent Statements.

There is yet a final reason why the Alabama Supreme Court refused to treat Mr. Johnson's post-arrest statement as subject to the Harris-Hass exception. The prosecution, in each of the four purported instances of impeachment, failed to lay properly the required foundation for introduction of extrinsic evidence.

One: Over a series of questions to Mr. Johnson, the prosecution attempted to show, in part through the post-arrest statement, that Mr. Johnson had leapt from an apartment window not, as he testified, because he feared harm from his companions but because he thought they had called the police. (R. 1039-44)

Read in full, however, the post-arrest statement supported Mr. Johnson's in-court testimony. It reflected that Johnson "thought at first" the police had been called. (R. 1100) But it also showed Johnson had ultimately left through the window only because his companions were about to attack him. (R. 1101-02) There were no contradictions, no "conflicting statements", and thus no good faith bases on which to introduce extrinsic evidence of the prior statement. Harris, 401 U.S at 223. See also Wypsinger v. State, 448 So.2d 435, 438 (Al.Cr.App 1983), cert. denied, 448 So.2d 435 (Ala. 1984); McElroy's Alabama Evidence (4th ed. 1991), §155.02(7).

Two: The state next took to impeaching Mr. Johnson over whether a pistol he sought to buy, between the time of the crime and his arrest, was priced at twenty or forty dollars. (R. 1045-46) Only a material fact, however, is a proper area for impeachment under Alabama law. See Wilson v. State, 551 So.2d 447 (Ala.Cr.App.), cert. denied, 551 So.2d 447 (Ala. 1989) (rape victim's prior statement that she "socialized" with defendant was immaterial and thus inadmissible for impeachment). McElroy's

Alabama Evidence (4th ed. 1991), §156.01(1).

It is certain **any** evidence about a firearm purchase was inadmissible as evidence of uncharged crimes and prior bad acts illicitly reflecting on character. And it is beyond certain that whether the gun's price was to be twenty or forty dollars was immaterial, irrelevant and thus not within the allowable scope for impeachment.[1]

Three: On the same basis of immateriality, the state's attempt to impeach Mr. Johnson about his specifically thinking of the electric chair, prior to arrest, was improper. (R. 1069-72) Johnson was asked on cross "Did you think about what kind of possible punishments there were for that crime?" (R. 1070) Mr. Johnson replied: "I'm no dummy...I know what a capital murder is". A moment before he had conceded: "I was scared of what they said I had done". (R. 1070)

Whether Johnson had, further, envisioned Alabama's precise mechanism for execution was inconsequential. It surely provided no excuse for injecting an otherwise inadmissible thirty-page

---

[1] Further, whether trial counsel made materiality objections is unclear because the record does not contain transcription of the side-bar conferences. See, e.g., R. 1042. Even if counsel did not register materiality objections, though, there was, under state law, no waiver concerning the erroneous introduction of extrinsic evidence of those immaterial matters. McElroy's Alabama Evidence, (4th ed. 1991) § 156.01(1)n.3. Additionally, Alabama applies a plain error rule to its capital cases. Alabama Rule of Appellate Procedure 45A.

statement into the record.

Additionally, discounting the materiality problem, this impeachment was rendered improper by the prosecutor's flat refusal -- "I don't want to hear what you told him" -- to allow Mr. Johnson to explain how he had "told Sergeant Boissel something similar to that". (R. 1072) This refusal left unclear whether Mr. Johnson was, as required, substantially denying having made the statement in question. Ex parte Watts, 471 So.2d 505, 506-7 (Ala. 1985) (holding Hass did not undo the requirement for a predicate denial of the prior inconsistent statement).

Finally and likewise, when the state attempted to impeach Mr. Johnson on a question of changed clothing, his ambiguous response to his prior statement was: "That is a lie". (R. 1076-77) Did this mean Mr. Johnson was claiming the particular prior comment was a lie on his part? Or that the state's suggestion that he had made the post-arrest comment was a lie? Because the trial court disallowed Mr. Johnson's attempt to clarify,[2] it never became clear. Thus the proper predicate for the introduction of extrinsic evidence was not satisfied.

---

[2] Mr. Johnson asked: "May I say something?" The trial court stated: "No, sir. You can step down". (R. 1077) This constituted, additionally, an infringement on Mr. Johnson's right to testify, due process and a fair trial. Ex parte Watts, 471 So.2d at 507("Fairness requires that the witness whose credibility is being attacked be given an opportunity to explain the seeming inconsistencies".).

In sum, neither the prosecution nor the trial court treated Mr. Johnson's statement as simply a fulcrum from which to leverage impeachment; neither displayed any reliance on the Harris-Hass exception. Accordingly, the Alabama Supreme Court had no reason to imagine such reliance where the record belied it.[3]

III. THE PETITIONER'S THREE QUESTIONS PRESENTED DO NOT, ON FACE, MERIT CERTIORARI REVIEW.

Put aside that Petitioner's three *questions presented* have little, or nothing, to do with the record considered or the decision rendered by the Alabama Supreme Court. There still remains here a startling lack of "special and important reasons" for granting review on a writ of certiorari. Sup. Ct. Rule 10.

At best, the Petitioner is claiming that the Alabama Supreme Court made a mistake, that, by ignoring Harris and Hass, the appellate court 'got it wrong'. The Supreme Court of the United States, however, "is not a forum for the correction of errors." Boag v. MacDougall, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting).

Ordinarily, certiorari must be reserved for "conflict among

---

[3] Petitioner vaguely suggests that Respondent, when before the Alabama Court of Criminal Appeals and the Alabama Supreme Court, conceded that Mr. Johnson's post-arrest statement was admitted only for rebuttal. *Petition* at 8. The briefs filed in the Alabama appellate courts contradict this assertion: *Brief Of The Appellant Johnson*, *Petitioner Johnson's Brief In Support Of Petition For A Writ Of Certiorari*, *Petitioner Johnson's Reply And Supplemental Brief*.

jurisdictions over an issue which 'imperatively demand[s] a single uniform rule' [and therefore] commands the Court's immediate attention." Brown Transportation Corp. v. Atcon, 439 U.S 1014, 1015 (1978) (citation omitted; emphasis added) (White & Blackmun, JJ., dissenting from denial of certiorari).

No such compelling conflict is even claimed here.

Last, Petitioner contends that Ex parte Rickey Lee Johnson demonstrates open and inevitably contagious "hostility toward this Court's supremacy." As a sign of this danger, the Petitioner notes that *The Alabama Lawyer* synopsized Ex parte Rickey Lee Johnson eight weeks after its issuance. *Petition* at 30-33. As revealed in the Petitioner's own appendix, though, *The Alabama Lawyer* did not interpret the decision as a rejection of Hass or Harris but as a somewhat routine enforcement of Miranda in a case where a defendant's statement was presumably considered for all purposes. *Appendix to the Petition* at 21-23.

IV. THE SUMMARY REVERSAL THE STATE OF ALABAMA DESIRES WOULD BE WHOLLY UNJUSTIFIED.

The Petitioner, apparently relying on Supreme Court Rule 16, asks that the Alabama Supreme Court be summarily reversed. *Petition* at 30-36. Such dispositions, though, are "rare disposition[s] usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error". Schweiker v. Hansen,

450 U.S. 785, 791 (1981) (Marshall & Brennan, JJ., dissenting).

Plainly, Mr. Johnson's case does not present such a situation. As shown in Argument II, Mr. Johnson's post-arrest statement did far more than simply impeach the defendant. The Petitioner thus premises his claim of state court error on a wholly untenable and private interpretation of Ex parte Rickey Lee Johnson as trampling on the rule of Harris and Hass.

But even if Mr. Johnson's post-arrest statement had served only to impeach, thus making Harris and Hass applicable, reversal would still have been due under state and federal law. To qualify for admission under Harris and Hass, a statement can defy Miranda requirements but must be, at its core, voluntary. Michigan v. Harvey, 494 U.S. 344, 351 (1990). Mr. Johnson was entitled, as requested (R. 001390), to a hearing on voluntariness. Jackson v. Denno, 378 U.S. 368 (1964).

Indeed, by the law of Alabama at least, he was entitled to precisely the hearing outside the presence of the jury which his pre-trial motion explicitly contemplated. (R. 001390) Felder v. State, 470 So.2d 1321, 1326 (Al.Cr.App. 1984), aff'd, 470 So.2d 1330 (Ala. 1985), vacated on other grounds, 474 U.S 976 (1985) (defendant so requesting entitled to a hearing on statement voluntariness outside jury's presence). See also Jones v. State, 584 So.2d 917, 919 (Al.Cr.App.), cert. denied, 584 So.2d 917 (Ala. 1991). Cf. Pinto v. Pierce, 389 U.S. 31 (1967) (upholding

conviction where trial court held voluntariness hearing in presence of jury but emphasizing defense counsel's consent to such procedure).

The opportunity for any hearing was never afforded Mr. Johnson amidst the 'slap-dash' injection of his thirty-page statement into the record. (R. 1078-895) He was then doubly deprived. Though "entitled to a reliable and clearcut determination [whether] the [statement] was in fact voluntarily rendered", Lego v. Twomey, 404 U.S. 477, 479 (1972), Mr. Johnson received no such finding. Though entitled to have "the prosecution...prove by at least a preponderance of the evidence that the confession was voluntary", id., Mr. Johnson had no such showing.

Reversal in the Alabama Supreme Court was inevitable under either a Miranda or Harris-Hass analysis. This weighs against certiorari review. See, e.g., Ohio v. Huertas, 498 U.S.____, 111 S. Ct. ____, 112 L. Ed. 2d 837 (1991) (declining to review continuing viability of Booth v. Maryland, 482 U.S 496 (1987)). Even more clearly, it precludes this Honorable Court's summarily reversing to achieve a wrong result.

CONCLUSION

Wherefore, Mr. Johnson respectfully suggests that it would be improvident to grant certiorari in this case.

Respectfully submitted,

Kevin Martin Doyle*
Bryan A. Stevenson
158 Lucerne Boulevard
Birmingham, Alabama 35209
(205) 879-1035

Attorneys for Mr. Johnson

*Counsel of Record